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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TYRONE KENNER,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit affirming Petitioner's convictions for mail fraud based on the sale of his political influence as a party functionary as opposed to any decision as an elected representative is in conflict with the decision by the United States Court of Appeals for the Eighth Circuit in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) and creates a new theory of liability under the mail fraud statute, an issue of general importance which should be settled by this Court.

2. Whether the decision of the United States Court of Appeals for the Seventh Circuit affirming Petitioner's convictions on the Hobbs Act counts in the absence of any evidence of inducement and under a jury instruction which did not

require inducement, conflicts with the decision of the United States Court of Appeals for the Second Circuit in United States v. O'Grady, 742 F.2d 682 (2nd Cir. 1984).

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit that the mailings identified in the mail fraud counts need only be forseeable to satisfy the "in furtherance" requirement is in conflict with this Court's decision in United States v. Maze, 414 U.S. 395 (1974).

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No.

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1985

TYRONE KENNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, Tyrone Kenner, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A, attached hereto. The Order of the United States Court of Appeals denying a Petition for Rehearing en banc appears in Appendix B, attached hereto. The judgment order and sentence of the United States District Court for the Northern District of Illinois appears in Appendix C, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 14, 1985. Petitioner filed a Petition for Rehearing with en banc suggestion, which was denied in an order entered on June 13, 1985. This Petition is filed within sixty days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The 5th Amendment to the United States Constitution provides, in pertinent part:

"...no person shall... be deprived of life, liberty or property, without due process of law;..."

STATEMENT OF THE CASE

Petitioner, Tyrone Kenner, was an alderman of Chicago's 3rd Ward since 1971 and a Democractic Party functionary since October, 1978. The 3rd Ward was a very poor ward with a 30% unemployment rate. In 1980 the median income in Chicago was $18,000 but the median income in the 3rd Ward was approximately $8,000.

An alderman in the City of Chicago serves as a legislative representative to the city council. The job also entails serving as an ombudsman with various agencies on behalf of constituents. A committeeman, in contrast, is a party functionary. Although elected, a

committeeman is not a public official. The committeeman, not the alderman has access to patronage jobs for the ward.

The 3rd Ward Democractic organization, which conducted campaigns in 22 elections since 1971, raise money through a variety of fundraising efforts. Fundraising was difficult in the 3rd Ward because of the high unemployment rate and low income levels within the ward. In addition, the ward had higher election expenses in that people in the ward could not afford to work elections on a voluntary basis, requiring payment for those services.

Under the Illinois Campaign Disclosure Act contributions were reported on D2 forms, filed with the county clerk and state board of elections. Monies contributed to and expended on the ward committeeman elections were not subject to disclosure. Moreover, contributions received and expended for political, as distinct from

electoral and charitable purposes, were also not subject to disclosure.

In 1977, a businessman, Murphy Palmer, established a grocery store, Country Meat Markets, in the 3rd Ward. Palmer and Petitioner met shortly after Palmer's business became established in the ward. Thereafter, Palmer became an active fundraiser for the 3rd Ward Democratic organization. At one point Palmer tried to organize a group of business people to become financial supporters of the ward. Palmer, who became one of the ward's best fundraisers, twice received an award for the amount of money he was able to raise.

Palmer, who assisted various individuals in becoming Cook County Holiday Court Deputy Sheriffs, asked Petitioner to recommend particular individuals for the job. Holiday Court Deputy Sheriffs were part of the courtroom

attendent division of the Court Services Department of the Cook County Sheriffs Office. The Sheriff hired from 800-900 Holiday Court Deputy Sheriffs. Each Holiday Court Deputy was scheduled to work one day a month at a rate of pay of $26.50 per day. As a general rule Holiday Court positions were popular with business people who wanted the ability to carry a gun.

In the period from 1978 to 1981, the Sheriff of Cook County, Richard Elrod, decided who would become Holiday Court Deputy Sheriffs. Generally his decisions were based on recommendations he received from prominent people in the community, ward committeemen and aldermen. After receiving a recommendation the Sheriff would run a background check for any prior criminal record. If an applicant had a criminal record, the Sheriff would analyze the record before making a determination.

In the period from 1978 to 1981 Sheriff Elrod had discussions with Petitioner in which Petitioner recommended individuals.

The individuals whom Petitioner recommended for the position of Holiday Court Deputy Sheriff were brought to his attention by Murphy Palmer. Each person who was recommended testified that they first contacted Murphy Palmer about the Holiday Court Deputy Sheriffs positions. Palmer suggested to each that they make a political contribution, and each contributed approximately $1,500. Palmer gave most of the individuals a written receipt on the back of his business card. Several of the individuals testified that they did not know what Palmer did with the money; only two individuals testified that they believed the money was contributed to the 3rd Ward Democratic organization.

Palmer accompanied most of the individuals when they went to fill out the

application for the Holiday Court Deputy Sheriffs positions. On each occassion Palmer first stopped at City Hall and went into an aldermanic office before taking the applicants to the County offices. Only two individuals testified that they met Petitioner and one testified that he did not know Petitioner was an alderman.

In March, 1980, just prior to the committeeman elections, Palmer gave Petitioner almost $7,500 in contributions. The money was expended on the committeeman elections. The contributions, according to Palmer, were generated from business people. Later Palmer asked Petitioner to recommend the various individuals for the Holiday Court positions.

In the City of Chicago only electricians licensed by the Board of Examiners as supervising electricians could pull permits within the city. Prior to January 1, 1979 the test for licensure was developed and

graded by the head of the electrical union. After that date, power was briefly vested with the Board of License, Examination and Registration, which was composed of one representative from each trade. The position of supervising electrician on the Board was never filled. As a result, the supervising electrician licensing examination was not developed or administered in 1979. On July 12, 1979 the Board was abolished and replaced with the Bureau of Licensing, Registration and Permits within the Department of Inspectional Services. After the restructuring, the Bureau administered a computer graded, objective examination on September 27, 1980.

Fred Tyler was a postal employee who was also self-employed as an electrical contractor. Prior to 1979 he took the superivising electricians licensing examination six times without success. He finally passed after taking the exam in

July, 1980.

Tyler took the test three times in 1976. After each test he spoke with Petitioner, who assured him that he would pass and that Petitioner would speak with the Mayor. Tyler flunked nonetheless.

Before he took the July 12, 1978 exam, Tyler called Petitioner, who as usual, told him not to worry about the exam. After he took the exam Tyler told the Petitioner that he had heard it took $2,500 to pass. Petitioner told Tyler that he did not know if he could help him. After the conversation with Tyler, Petitioner canvassed Board of Examiner personnel and various black contractors to ascertain if blacks were, in fact, discriminated against in the test results. Petitioner later told Tyler that there might be some credence in that belief and that he would try to help him. Petitioner took

$2,500 from Tyler, but after being informed that Tyler flunked the test, Petitioner arranged to return the money. In returning the money Petitioner asked if he could borrow $1,000 as he was in a tough race. In the spring, 1979, after he contacted the FBI, Tyler renewed his contacts with Petitioner in a series of recorded conversations. At the second meeting with Petitioner he gave Petitioner $1,500. He also asked Petitioner to help his nephew, Joe Turner, who wanted a low voltage license to start an alarm installation business. Joe Turner was an undercover FBI agent.

Petitioner referred Tyler to an Assistant Director of the Bureau of Licensing, Registration and Permits. Petitioner intended to use the $1,500 for political contribution to the Assistant's ward.

The Assistant, Mike Bruen, testified

that he received a call from Petitioner advising him that he was sending Tyler to see him. A few days later, Tyler came into the office and Bruen helped him with the application. Bruen testified that Petitioner never asked him to affect Tyler's grade, nor did he offer Bruen any money. Petitioner often called, however, to find out if the Board's supervising electricial position had been filled so that the exam could be administered.

Wyley Thompson, the FBI agent who posed as Joe Turner, repeatedly contacted Petitioner to request an appointment. After much effort he saw Petitioner on May 6, 1980. He took a completed low voltage license application to City Hall where he waited two hours for Petitioner. When he finally met with Petitioner he told Petitioner that he was desperate and that he was willing to pay for the license. Petitioner did not know how to go about

getting low voltage licenses. Thompson-Turner took a wad of one hundred dollar bills totalling $2,500 out of his pocket and counted out $500.00. When Petitioner took the money Petitioner told Thompson-Turner that he would return the money if he could not use it to help him. In April, 1981, Petitioner's attorney, Nathaniel Howse, asked the government if Petitioner could return the money.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit affirming Petitioner Kenner's convictions for mail fraud based on the sale of his political influence as a party functionary as oppossed to any decision as an elected representative is in conflict with the decision by the United States Court of Appeals for the Eighth Circuit in United States v. Rabbitt, 583 F.2d 1014 (8th Cir.

1978) and creates a new theory of liability under the mail fraud statute, an issue of general importance which should be settled by this Court. The decision of the United States Court of Appeals for the Seventh Circuit affirming Petitioner Kenner's conviction on the Hobbs Act counts in the absence of any evidence of inducement and under a jury instruction which did not require inducement, conflicts with the decision of the United States Court of Appeals for the Second Circuit in United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984). The decision of the United States Court of Appeals for the Seventh Circuit that the mailings identified in the mail fraud counts need only be forseeable to satisfy the "in furtherance" requirement is in conflict with this Court's decision in United States v. Maze, 414 U.S. 395 (1974).

The line between legitimate political

fundraising and patronage choices, as expressions of First Amendment rights, and prohibited behavior under sections 1341 and 1951(b)(2) is not bright. And, the decision by the United States Court of Appeals for the Seventh Circuit in this case, blurs the distinctions between prohibited and non-criminal behavior, criminalizing previously non criminal behavior. As this Court recently reiterated in Kolander v. Lawson, 461 U.S. 352, 357, 75 L.Ed 2d 903, 909, 103 S. Ct. 1855 (1983), "..the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Further, where the legislature fails to provide mininal guidelines, as is becoming apparent with the recent

applications of §1341 and §1951 to political conduct, "..a criminal statute may permit a standardless sweep [that] allows.. prosecutors.. to pursue their personal predelections." Id, 461 U.S. at 358, 75 L.Ed 2d at 909 (citations ommitted).

A. The Seventh Circuit's Decision Applying Fiduciary Fraud Theories Of Liability To The Sale Of Political Influence Unrelated To Any Decision As An Elected Representative Broadened The Scope Of The Mail Fraud Statute Beyond Its Moorings Which Raises Issues Of Vaguess.

Petitioner Kenner was charged in an indictment which alleged a broad overall scheme to defraud the citizens of Chicago, the City Council and the Democratic voters of the 3rd Ward of their right to Petitioner's honest and faithful services through Petitioner's receipt of monies from individuals seeking Holiday Court Deputy Sheriffs positions and electricians licenses. At trial, however, there was no evidence adduced that Petitioner

breached any duty as a legislator Petitioner's duties as alderman, a legislator for the City of Chicago, did not entail any responsibility over the County Sheriff's Office. In fact, the Sheriff very firmly testified that he made all hiring decisions. Moreover, the dispensing of electrical licenses rested entirely with an executive agency over which Petitioner had no control. In neither instance was Petitioner's recommendation self-executing as the individual who paid money still had to meet the standards under the Sheriff's Office and Licensing Bureau.

Petitioner's receipt of money, then, as a political functionary for recommendations to Deputy Sheriffs positions and for electrical licenses did not deprive the public of his honest and faithful services with regard to his decisions as an alderman. And, the evidence, as exemplified by the

acquittals on the tax counts, proved Petitioner did not receive any secret profits. All monies received were channelled into electoral or charitable activities of the 3rd Ward Democratic Party.

In affirming Petitioner's mail fraud convictions, the Seventh Circuit expanded the fiduciary fraud theory of mail fraud to encompass Petitioner's private, albeit political, activities, as opposed to his public activities as alderman. In sanctioning the expansion, first countenanced in the government's proposed jury instruction which specified that the government need not necessarily prove the offense of bribery, which goes to the heart of whether Petitioner was acting in a public as opposed to private capacity, the Seventh Circuit glossed over the due process and First Amendment implications.

The opinion of the Seventh Circuit stated that no bright line existed between

Petitioner's acts as a party official and his acts as an elected official. The court concluded that the sale of "political" influence therefore inexplicably deprived the public with regard to Petitioner's decisions as an elected representative.

In United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. den. 439 U.S. 1116 (1979), in contrast, the Eighth Circuit meticulously analyzed whether the defendant's acts were done in his capacity as a public official. In Rabbitt a state legislator accepted money in exchange for recommending to a state agency that a certain company receive contracts which the agency was awarding. Id. at 1026. The court held that the defendant had not deprived the citizens of their right to defendant's honest and faithful services because the defendant's fiduciary responsibility was limited to the responsibilities of his legislative

office or leadership position. Id. In this case, had the analysis in Rabbitt been applied, the court should have found that the citizens of Chicago were not entitled, according to common law fiduciary duty, to political contributions given to the Petitioner or his disinterested judgment in political decisions because those matters were, as in Rabbitt, outside the scope of the duty owed.

The analytical underpinnings and origin of the "intangible rights" theory lie in the application of §1341 to schemes by an employee or trustee to defraud an employer or a trust beneficiary of an interest through a breach of fiduciary responsibility. In some typical cases the scheme was designed so that the employee or trustee would directly obtain the principal's interest. E.g. United States v. Buckner, 108 F.2d 921 (2nd Cir. 1940) (trustee prosecuted for embezzling

money from indentured trust). In other instances, typical "kickback" cases, the employee breached a fiduciary duty in exchange for payment to a third party, and the employer's tangible loss was a transfer of property or money to the third party. E.g. United States v. Brown, 79 F.2d 321 (2d Cir. 1939) (stockbrokers defrauded customers by accepting bribes to recommend stocks).

The mail fraud statute has also been applied to public officers and governmental employees whose schemes were similar to those of private employees or trustees. E.g. United States v. Biggs, 613 F.2d 988 (D.C. Cir. 1979) (Congressman embezzled money from federal government through false pay vouchers); United States v. Barrett, 505 F.2d 1091 (7th Cir. 1975) (higher price for voting machines paid by county as a result of bribe to

defendant); Bradford v. United States, 129 F.2d 274 (5th Cir. 1942) (city councilman arranged purchase of buses at inflated price in return for kickback). In each of these cases, from both the private and public contexts, the defendant misused the position with respect to the victim so that the victim was deprived of property or money, a tangible loss.

Following the logic of fiduciary duty as applied to agency situations, courts have recognized that a victim is defrauded not only when a fiduciary takes away something of pecuniary value, but also when a victim does not receive that to which the victim is entitled under common law. E.g. United States v. George, 477 F.2d 508 (7th Cir. 1973) (employer deprived of defendant's honest and loyal services when defendant received kickbacks from supplier although supplier charged fair price).

The decision in United States v. George, Id., spurred movement towards applying the intangible rights doctrine to public officials. Relying on the George rationale, the Seventh Circuit and other circuits have applied principles taken from the common law of fiduciary responsibility and applied the intangible rights doctrine to schemes involving public officials. E.g. United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974); United States v. Mandel, 590 F.2d 1347 (4th Cir. 1979); United States v. Brown, 540 F.2d 364 (8th Cir. 1976).

In applying the intangible rights doctrine, cases have required more than proof that the defendant was a fiduciary under state law to find a violation of the mail fraud statute. The evidence had to prove that the defendant's conduct deprived them of something to which they were entitled under the common law of

fiduciary responsibility. In each intangible rights case, the courts have sought to define the basis of the defendant's fiduciary duty, the nature and extent of the duty, and the person to whom the fiduciary duty is owed.

The process of precisely defining fiduciary duty owed by the public official excludes from the scope of the intangible rights doctrine those cases in which a fiduciary's misconduct is unrelated to a fiduciary duty. Under Illinois law, Petitioner holds a fiduciary position as a member of the city council. Chicago Park District v. Kenrow, Inc., 78 Ill. 2d 555, 402 N.E. 2d 181, 185 (1980). The citizens of Chicago had a right to Petitioner's honest and impartial performance as his responsibilities as alderman. However, consistent with the common law fiduciary responsibility, Petitioner's duties as alderman extended

only to matters concerning the affairs of the City of Chicago. See Mullaney, Wells and Co. v. Savage, 78 Ill. 2d 534, 402 N.E. 2d 574, 580 (1980) (agent not obligated to act solely for the benefit of principal matters connected with agency).

As the Democratic 3rd Ward committeeman, Petitioner held no fiduciary position recognized by Illinois law. A committeeman is not a public officer. Whitsell v. Rutherford, 118 Ill. App. 2d 481, 255 N.E. 2d 34 (1969) (statute regulating party elections did not make party leaders state officers). To the contrary, the Illinois Supreme Court has on one occassion said that committeemen "represent the members of their respective political parties and are accountable to them alone." People v. Brady, 302 Ill. 576, 135 N.E. 87, 88 (1922).

Petitioner in this case did not breach any fiduciary duty concerning the business and affairs of the City of Chicago. Petitioner did not violate his duty to exercise disinterested judgment by allowing his vote on a bill before the City Council to be swayed by the contributions. E.g. United States v. Keane, 522 F.2d 534, 546 (7th Cir. 1975) (defendant voted for legislation favorable to property he had acquired on the basis of inside information). The defendant did not award city business contracts to the person who gave him money. E.g. United States v. Rauhoff, 525 F.2d 1170, 1175 (7th Cir. 1975) (secretary of state contracted with firm paying him kickbacks). The defendant did not violate his fiduciary duties by making a profit from secretly doing business with the city or by using inside information for personal enrichment.

E.g. United States v. Bush, 525 F.2d 641 (7th Cir. 1975) (employee failed to disclose ownership of firm doing business with city).

The federal judicial branch does not have the power to impose upon the local political participant standards of conduct not found in state law. As this Court has clearly said, "There may well be a need for uniform federal judiciary standards. But those standards should not be supplied by judicial expansion..." Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479-80 (1977). Because a political party leader is not a fiduciary under Illinois law, Petitioner had no fiduciary duty for the purposes of the federal mail fraud statute.

The Seventh Circuit's decision, finding Petitioner's conduct criminal under the mail fraud statute, is a new application of the statute not supported

by previous case law, raising an issue whether the void-for-vagueness doctrine is applicable. The application of fiduciary fraud concepts divorced from the common law delineating fiduciary relationships has increased the reach of the mail fraud statute with no accompanying meaningful standards. Commentators, who have been critical of the statute's expansion, have urged that Congress take initiatives to enact specific statutes addressing such conduct now prosecuted under the fiduciary fraud rubric. In that way, the statute would have meaningful standards of conduct. Coffee, Some Reflections On The Criminalization Of Fiduciary Breaches And The Problematic Line Between Law And Ethics, 19 Am. Crim. L. Rev. 117 (1981); Hurson, Limiting The Federal Mail Fraud Statute - A Legislative Approach, 20 Am. Crim. L. Rev. 423 (1983); The Intangible Rights Doctrine and Political

- Corruption Prosecutions Under the Mail Fraud Statute, 47 U. Chi. L. Rev. 562 (1980).

Further, the expansion of the mail fraud statute to cover Petitioner's conduct as a private individual raises First Amendment issues. Petitioner's recommendations concerning political patronage are clearly protected by the First Amendment. United Mineworkers v. Pennington, 381 U.S. 657, 670 (1965). The Seventh Circuit's attempt to expand the intangible rights doctrine to impose upon a political participant a fiduciary duty with respect to political decisions and political contributions must be examined and rejected because it would criminalize a substantial amount of constitutionally protected conduct. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Petitioner urges that this Court grant a petition to examine the expansion

of the mail fraud statute, which now, under the Seventh Circuit analysis, covers private as well as public conduct. The Seventh Circuit has abandoned the distinction between fiduciary and non fiduciary acts, in conflict with the Eighth Circuit's decision in United States v. Rabbitt.

B. The Seventh Circuit Decision Upholding Hobbs Act Convictions In The Absence Of Any Evidence Of Inducement And A Jury Instruction Requiring Inducement Is In Direct Conflict With The Second Circuit's Interpretation Of The Act.

In order to sustain a conviction under 18 U.S.C. §1951(b)(2) for extortion under cover of official right, the government must prove beyond a reasonable doubt that the defendant induced payments through the wrongful use of his public office. United States v. O'Grady, 742 F.2d 682, (2d Cir. 1984) (en banc). The Seventh Circuit's decision in this case is in plain conflict with the Second Circuit's

O'Grady opinion because the Petitioner was convicted in the absence of any evidence of inducement through the wrongful use of his public office and without an instruction to the jury requiring it to find inducement before it could find the Petitioner guilty of extortion under color of official right. In order to resolve the conflict between the Second and Seventh Circuits, this Court should review the Seventh Circuit's decision.

In United States v. O'Grady, the court held that the essential element of wrongful use of office is proven only where there is evidence beyond a reasonable doubt that the defendant knew that the donor made the payment in order to receive favorable treatment and that the defendant induced the donor to make the payment by demand, a wrongful or non-performance of an official duty or act, or by the

defendant's acceptance of a quid pro quo. Id. at 688, 690, 691-92. In reaching it's decision, the Second Circuit noted, "Public officials occupy unique positions of influence and power in our society and are the focus of great admiration and intention as well as intensive lobbying. Vast sums of money are spent in efforts to persuade, control or appease them." Id. at 693. Accordingly, the inducement requirement clearly demarcates legitimate fundraising activity and even unethical, although non criminal, receipt of gratuities from the extortionate conduct which is proscribed by the Hobbs Act. See also United States v. Dozier, 672 F.2d 531 (5th Cir.), 459 U.S. 943 (1982) (legitimate fundraising solicitation distinguished from unlawful conduct by the existence of a quid pro quo).

The Petitioner's recommendation of individuals for political patronage

positions of Deputy Sheriff were not wrongful uses of his office as alderman. The Petitioner did not control who became a Deputy Sheriff; the Sheriff of Cook County testified that he made the decisions, based upon recommendations of prominent people in the community, including ward committeemen and aldermen. Similarly, the Defendant did not have any control over the issuance of licenses by the Bureau of Electrical Inspection. For example, Fred Tyler, the alleged victim in Counts 15 and 16, flunked the electrician license exam in 1976 and 1977, even though Kenner had assured Tyler that he would do well. The Petitioner frequently interceded with city and county agencies on behalf of citizens. Thus, Kenner's offer to speak on Tyler's behalf to the Mayor and to the man who administered the exam was not a wrongful use of his office. Similarly, the Petitioner's

offer to Thompson-Turner to find out about the procedure for obtaining low voltage licenses was not a wrongful use of his office. The Petitioner did not guarantee Thompson-Turner a license and offered to return the money if Kenner could not give it to others on Thompson's-Turner's behalf.

The evidence adduced at trial showed that the Petitioner did not solicit the payments. Neither the Petitioner nor Murphy Palmer sought out the persons who wanted to be Holiday Court Sheriffs, Thompson-Turner, or Fred Tyler; each of them came to Palmer or Kenner voluntarily.

Evidence that each of the persons who gave money to Palmer or Kenner had a specific quid pro quo in mind when they made the payment does not establish extortion. Moreover, as O'Grady makes clear, a public official's knowledge that the person making the payment had a specific

quid pro quo of favorable treatment in mind does not establish exortion. Nonethless, the evidence established a considerable doubt that Kenner knew of the quid pro quo which the applicants for the Deputy Sheriff positions intended. Murphy Palmer testified that when he discussed with the Petitioner the payments made by McCaskill, Hudson, Morris, Hayes, Luster, Brezell, Jenkins and Smith, he did not tell the Petitioner that there was any quid pro quo or condition attached to the payments.

To the extent that the Petitioner had knowledge of the quid pro quo exchange intended by the Deputy Sheriff applicants or by Tyler or by Thompson-Turner, that knowledge does not establish inducement by the wrongful use of public office. Without violating the Hobbs Act, a person who takes an action or adopts a position can undoubtedly accept

contributions or payments from persons whom ke knows specifically approve of that position or course of action. Similarly, an official who accepts contributions from persons whom he knows want him to take a particular course of action is not foreclosed from taking that course of action by the Hobbs Act. In order to prove inducement through the wrongful use of his office, the government should have been required to prove beyond a reasonable doubt not only that the Petitioner knew of the proposed quid pro quo, but that the Petitioner accepted that quid pro quo and acted only because of the promise of payment.

Not only was there no evidence that the Petitioner induced the payments he received through the wrongful use of his office, but the instruction given to the jury permitted the jury to find the Petitioner guilty on the Hobbs Act counts

without finding that the Petitioner induced the payments. In pertinent part, the jury was instructed:

> It does not matter whether the public official induces the payment to perform his duty or not to perform his duties. "Extortion under color of official right" does not require proof of specific acts by the public official demonstrating force, threat or use of fear.
>
> The mere acceptance of money by one who is a public official does not constitute bribery. The receipt of campaign contributions which the recipiant does not know are directly related to a specific act performed or to be performed by him on behalf of the contributor, does not constitute receipt of money through the wrongful use of his position.
>
> On the other hand, the receipt of of money by the office holder, whether directly or indirectly, if he knows the money was paid or contributed in exchange for a specific act performed or to be performed by him, does constitute extortion under color of official right.

(Emphasis added).

Under this plainly erroneous instruction, the jury was encouraged to find the Defendant guilty of extortion

merely because he knew that the money was paid to him in order to influence his performance. However, such knowledge is insufficient by itself to establish extortion and must be accompanied by proof that the public official induced the benefits received. Cf. United States v. O'Grady, 742 F.2d at 688.

In order to resolve the conflict in the Circuit Court of Appeals concerning the element of inducement under the Hobbs Act, this Court should grant it's writ in order to review the Seventh Circuit's decision.

C. The Seventh Circuit's Decision Collapsed The Two Aspects Of The Mailing Element Of Mail Fraud, Causality And Purpose, Reducing The "In Furtherance" Requirement To A Forseeability Issue In Contravention Of This Court's Analysis In Cases Such As United States v. Maze, 414 U.S. 395 (1974).

In a prosecution under 18 U.S.C. §1341, the government must allege and prove

more than the mere presence of the mails in the facts of the case; the mailing must further the scheme in some identifiable way. As this Court noted in United States v. Maze, 414 U.S. 395, 404 (1974): "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be 'for the purpose of executing such scheme or artifice...'". (quoting 18 U.S.C. §1341, footnote deleated).

In order to satisfy the essential element of a mailing in furtherance of a scheme to defraud, the evidence must demonstrate that the defendant caused the matter to be mailed and that the mailing furthered the scheme to defraud. The mailing element thus has two parts: A causality requirement and a purpose

requirement. This dual requirement is plainly evident from the language of the statute and has been recognized in the case law. The causation aspect of the mailing element requires only that use of the mails can be recently forseeable. Pereira v. United States, 347 U.S. 1, 8-9 (1954). But satisfaction of the causation element by finding forseeability does not satisfy the purpose requirement as is evident from a long line of cases decided by this Court. For example, in United States v. Maze, the forseeability of the mailing of invoices and billing statements did not resolve the question of whether or not the mailing furthered the credit card scheme. Similarly, the presentment for payment of checks in Kann v. United States, 323 U.S. 88 (1944) was undoubtedly forseeable, since without presentment and payment of the checks the defendant would not have fraudulently obtained the

corporate funds.

The evidence adduced at trial showed that the Bureau of Electrical Inspection had a general policy of mailing notices of upcoming licensing examinations to applicants for electricians licenses. Those notices became the mailings identified in those counts. The evidence also showed that the Sheriff of Cook County, as a standard procedure fingerprinted persons who wished to be Holiday Court Deputy Sheriffs and mailed cards with those fingerprints to the Illinois Department of Law Enforcement and the Federal Bureau of Investigation to determine if the applicants had criminal records. Those mailings of fingerprint cards formed the basis of the mailings for the mail fraud counts with regard to the Sheriffs positions.

The indictment charged that the scheme was intended to defraud the citizens

and voters of their intangible rights to the honest and loyal services of the Petitioner. According to the indictment, the scheme was accomplished once the Petitioner accepted contributions, the purported "secret profits" in breach of his fiduciary duty. Thus, application of the mail fraud statute was warranted only if the success of the scheme to obtain secret profits was contingent, at least in some way, upon the mailings which were alleged and proved. However, whether or not the citizens and voters were deprived of their intangible rights to the honest and loyal services of the Petitioner in no way depended upon the mailing of fingerprint cards by the Sheriff or examination notices by the Bureau. Once the Defendant received money from the individuals who sought to be Holiday Court Deputy Sheriffs or supervising electricians, he "received it irrevocably", Kann, 323

U.S. at 94, and assuming that the other elements were proved beyond a reasonable doubt, the citizens'and voters' intangible rights were similarly irrevocably lost long before any mailing occurred.

Assuming that all other elements of a violation of section 1341 was proven beyond a reasonable doubt, the evidence did not establish a violation of the mail fraud statute because the mailings proved did not further the scheme. The success of the scheme to defraud the citizens and voters of their intangible rights did not depend upon approval of the fingerprint cards by the FBI or the Illinois Department of Law Enforcement, nor upon notification of the upcoming electricians examination. The object of the scheme was to obtain "secret profits". The scheme reached fruition once the Petitioner was given money, and the mailings at issue contributed nothing to the success of that

scheme.

The Seventh Circuit's determination that the mailings identified in this case were in furtherance of the scheme to defraud is a departure from the analysis of the "in furtherance" requirement cases decided by this Court. The Seventh Circuit, in collapsing the causality and purpose requirement to initial forseeability adopted a new standard which is in conflict with the prior decisions of this Court and raises a question which should be decided by this Court.

CONCLUSION

For the foregoing reasons, Petitioner, Tyrone Kenner, respectfully prays that this Honorable Court issue it's writ of certiorari to review the judgment in order of the United States

Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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A P P E N D I C E S

Appendix A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Argued September 18, 1984

January 14, 1985 .

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court
No. 83-2247 -vs-	for the Northern District of
TYRONE T. KENNER, Defendant-Appellant.	Illinois, Eastern Division
	No. 83 CR 545
	Susan Getzendanner, Judge.

ORDER

Kenner appeals his conviction on nine counts of mail fraud, in violation of 18 U.S.C. §1341, eleven counts of extortion

*Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

affecting commerce, in violation of 18 U.S.C. §1951, one count of conspiracy to commit extortion affecting commerce, in violation of 18 U.S.C. §1951, and one count of obstructing justice, in violation of 18 U.S.C. §1503.

Kenner challenges the admission into evidence of an incriminating taped conversation between his co-conspirator, Palmer, and himself. He argues that the admission of the tape violated his right to due process, his sixth amendment right to counsel, and his fifth amendment privilege against self-incrimination.

Kenner rests his general due process claim on the assertion that he drank so much vodka before and during that conversation with Palmer that his will was overborne and his statements were not the product of a rational and free will as required by Townsend v. Sain, 372 U.S. 293, 307 (1963). Having independently

reviewed the circumstances surrounding tha making of the tape, this Court finds that the totality of the Government's conduct during this episode of their investigation did not "'offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" Hoffa v. United States, 385 U.S. 293, 310-11 (1966) (quoting Rochin v. California, 342 U.S. 165, 169 (1952)). Throughout the taped conversation, Kenner drank voluntarily and talked lucidly about his illegal actions. He even discussed ways to conceal his crimes.

Since the Government had not begun adversary judicial proceedings at the time of the taped conversation, Kenner's "Sixth Amendment claim must fall, for it is settled that the right to counsel attaches only after such time as adversary

judicial proceedings have been initiated against him." United States v. Hansen, 701 F.2d 1215, 1220 (7th Cir. 1983) (citing Kirby v. Illinois, 406 U.S. 682, 688-90 (1972)); see also United States v. Gouveia, 104 S.Ct. 2292, 2297-99 (1984).

The evidence shows that "the conversation took place voluntarily, with no suggestion that [Kenner's] freedom to terminate or leave the conversation was in any way restrained." Hansen, 701 F.2d at 1220 (citation omitted). "The recording [] 'involved no confrontation with governmental authority in the context of a custodial interrogation calling for Miranda warnings.' Therefore, the recording [] did not violate [Kenner's] Fifth Amendment rights." United States v. Burton, 724 F.2d 1283, 1298 (7th Cir. 1984) (quoting United States v. Craig, 573 F.2d 455, 474 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978)).

Finally, the trial court did not err, by refusing to invoke its supervisory powers to exclude the taped conversation, because Kenner has shown no violation of his constitutional rights. United States v. Williams, 737 F.2d 594, 616 (7th Cir. 1984).

Kenner challenges his conviction on the mail fraud counts arguing that he owed no common law fiduciary responsibility to the public because, he insists, he was acting as a party official and not as an elected public official when distributing political patronage jobs. This Court notes that no brightline existed between Kenner's acts as a party official and Kenner's acts as an elected official. Kenner fails to recognize that it is his deprivation of the public of the exercise of his discretion in an unbiased and impartial manner which constituted the fraud...." United States v. Gorney, 732 F.2d 597, 602 n.2 (7th Cir.

1984). Kenner's sale of his political influence clearly deprived the public of their right to impartial, unbiased, and honest decisions by their elected representative. This deprivation violates the mail fraud statute which "condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" United States v. Keane, 522 F.2d 534, 545 (7th Cir. 1975), cert. denied, 424 U.S. 976, (1976) (citation omitted).

Kenner asserts that the trial court should have dismissed the mail fraud counts for duplicity. Count One of the second superceding indictment charges Kenner with breaching the fiduciary duties of his office by engaging in a scheme to take money in exchange for the use of his influence in obtaining electrician's licenses and "Holiday Court"

deputy sheriff positions. Counts One through Ten, Thirteen and Fourteen then charge twelve separate mailings in furtherance of the general scheme. While Kenner took money with respect to both electrician licenses and deputy sheriff positions, those actions defrauded the same parties by breaching the same duties under a single under a single scheme. Therefore, the mail fraud counts do charge a single scheme to defraud and do not constitute duplicitous counts. United States v. Zeidman, 540 F.2d 314, 317 (7th Cir. 1976). Further, the mail fraud counts do not pose any of the dangers of duplicity set forth in United States v. Berardi, 675 F.2d 894, 899 (7th Cir. 1982).

The trial court charged the jury as follows:

> The mail fraud scheme charged in this indictment has two facets or aspects. Counts 11 and 12 charge mailings

of notices of electrical examinations; they relate to one aspect of the scheme charged. Counts 1 through 10 and 13 and 14 charge mailings of fingerprint cards from the Sheriff's Office; they relate to the second aspect of the scheme charged.

You should consider each mail fraud count separately. In order to find the defendant guilty in an individual count, you must unanimously agree that the particular mailing was in furtherance of the scheme to defraud.

Therefore, in order to convict on Counts 11 or 12, which relate to electrical examinations, you must unanimously find that a scheme to defraud existed with respect to electrical examinations and that the particular mailing was in furtherance of the scheme. Similarly in order to convict on Counts 1 through 11 and 13 and 14, which relate

to Deputy Sheriff positions, you must unanimously find that a scheme to defraud existed with respect to Deputy Sheriff positions and that the particular mailing was in furtherance of the scheme. Record at 1833-34.

Kenner focuses upon the final paragraph and contends that the trial court released the Government from its duty to prove a broad scheme to defraud. Reading the jury instructions as a whole, and not focusing upon a single paragrpah, sentence, phrase or word, United States v. Alexander, 743 F.2d 472, 478 (7th Cir. 1984); United States v. Brown, 739 F.2d 1136, 1144 (7th Cir. 1984), this Court finds that the trial court properly instructed the jury that they had to find a single scheme having two aspects. If the paragraph to which Kenner objects stood alone, a much more substantial issue would exist. However, this Court must evaluate intru-

ctions "with the understanding that jurors are expected to listen to all they are told by the judge and that they will not isolate a particular portion of the instruction and ascribe to it more importance than the rest." Stewart v. Israel, 738 F.2d 889, 891 (7th Cir. 1984).

Since the mailings involved in Kenner's schemes were within the ordinary course of business, reasonably forseeable, and necessary to insure the victims that their payments were being rewarded, this Court finds no merit in Kenner's argument that the mailings were not in furtherance of his scheme to defraud. See Gorney, 732 F.2d at 601-02 and cases cited therein.

Kenner challenges his Hobbs Act convictions arguing that he did not receive money under the color of state right. The evidence indicates that Kenner obtained money to which he was not entitled from prospective Holiday Court Deputy Sheriffs by virtue of his official

position and that Kenner's victims who sought electrician's licenses focused their payments on his office because they believed that he could help them. These transactions fall within the proscriptions of the Hobbs Act, see United States v. Hedman, 630 F.2d 1184, 1195 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Rindone, 631 F.2d 491, 495 (7th Cir. 1980).

Kenner argues that his extortionate acts did not affect commerce within the meaning of the Hobbs Act. This Circuit had held that even a de minimus impact on commerce satisfies the jurisdictional requirements of the Hobbs Act, Hedman, 630 F.2d at 1195. The evidence shows that Kenner extorted money from individuals operating sole proprietorships in interstate commerce and from individuals who were later bonded by a Maryland Company. Both types of extortion fall

within the Hobbs Act. See United States V. Boulahanis, 677 F.2d 586, 590 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); Hedman, 630 F.2d at 1195-96.

Since the payments by Kenner's victims in Counts Seventeen and Twenty-nine did not directly affect interstate commerce and did not have any reasonable probability of affecting commerce because the victims merely had future plans to go into business, this Court must reverse Kenner's convictions on those two Counts.

Finally, Kenner claims that there was insufficient evidence to prove that he intended to defraud the public, that he intended to obstruct justice, and that he was involved in a conspiracy to extort. Reviewing the evidence in the light most favorable to the Government, this Court finds that substantial evidence exists to support the jury's conclusion that Kenner intended to both defraud the public

and obstruct justice, and that Kenner was involved in a conspiracy to extort. United States v. Jordan, 722 F.2d 353, 359 (7th Cir. 1983).

For the foregoing reasons, Kenner's conviction with respects to Counts Seventeen and Twenty-nine is REVERSED. In all other aspects, the conviction is AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 13, 1985 .

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. ROBERT A. GRANT, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- TYRONE T. KENNER, Defendant-Appellant.	Appeal from the District Court for the Northern District of Illinois, Eastern Division. No. 83 CR 545 Susan Getzendanner, Judge.

No. 83-2247

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in (sic) banc in the above-title cause on January 28, 1985, by defendant-appellant Tyrone T. Kenner, no judge in active service has requested a vote thereon, and

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Appendix C

DEFENDANT: TYRONE T. KENNER
DOCKET NO: 82 CR 545-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date-------- 6 - 28 - 83

_____WITHOUT COUNSEL However the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the ccurt and the defendant thereupon waived assistance of counsel.

__X__WITH COUNSEL Edward M. Genson
(name of counsel)

PLEA:

____GUILTY, and the court being satisfied that there is a factual basis for the plea.

____NOLO CONTENDERE,

_X__NOT GUILTY

FINDING AND JUDGMENT:

There being a finding/verdict of

___Not Guilty _X__Guilty

Defendant has been convicted as charged of

the offense(s) of knowlingly, willfully and unlawfully using the United States Mail in a scheme to defraud.

In violation of Title 18, United States Code, Section 1341.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: FIVE (5) YEARS on each of Counts 4, 6, 7, 8 and 9 of the Second Superseding Indictment. Said terms of incarceration on Counts 4, 6, 7, 8 and 9 are to run concurrently with each other.

Imposition of sentence on Counts 10, 12-18, 22-29 and 33 of the Second Superseding Indictment is hereby suspended and the defendant is placed on probation for a period of THREE (3) YEARS on each of the Counts 10, 12-18, 22-29 and 33. Said terms of probation are to run concurrently with each other and consecutively to the terms of imprisonment imposed on Counts 4, 6, 7, 8 and 9.

SPECIAL CONDITIONS OF PROBATION:

Execution of sentence is stayed until July 26, 1985.

Same bond to stand as bond on appeal.

Government's motion to dismiss the Original and First Superseding Indictment is granted.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this

judgment be imposed. The Court may change the conditions of probation at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The Court orders commitment to the custody of the Attorney General and recommends,

signed by

_X_ U.S. District Judge

____ U.S. Magistrate

/s/ SUSAN GETZENDANNER

/s/ SUSAN GETZENDANNER

Date June 28, 1983

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-358 (a)

In the Supreme Court of the United States

OCTOBER TERM, 1985

TYRONE KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner, a public official, committed mail fraud in violation of 18 U.S.C. 1341 by depriving the public of its right to his honest and faithful services.

2. Whether the district court's instructions concerning the elements of a violation of the Hobbs Act, 18 U.S.C. 1951, were plainly erroneous.

3. Whether the charged mailings furthered petitioner's scheme to defraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-358

TYRONE KENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1985, and a petition for rehearing was denied on June 13, 1985 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on August 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, eleven counts of extortion and one count of conspiracy to commit extortion, in violation of 18 U.S.C. 1951, and one count of obstruction of justice, in violation of

18 U.S.C. 1503. He was sentenced to concurrent terms of five years' imprisonment on five of the mail fraud counts, to be followed by concurrent terms of three years' probation on the other counts. The court of appeals affirmed, except with respect to two of the extortion counts (Pet. App. 1a-13a).

1. The evidence at trial showed that during the relevant time period, petitioner served as the alderman and Democractic Party committeeman for the City of Chicago's third ward. As an alderman, petitioner was the elected representative of the ward on the city council and represented his constituents in their contacts with city agencies. As a committeeman, petitioner represented party members of his ward in city and county party organizations. Tr. 127-128, 175-176, 1102, 1291, 1295.[1]

The charges against petitioner stemmed from his acceptance of payments from Chicago residents in return for his assistance in securing for them either an electrician's license or a part-time sheriff position. For example, Fred Tyler paid $1,000 to petitioner (through an intermediary) to assure a passing grade on the electrician's examination after he had failed it the first time. When Tyler failed the examination a second time, he called petitioner to demand the return of his money. Petitioner assured Tyler that he would pass the examination the next time; petitioner also promised to speak with the mayor and another city official about the matter. Tyler nonetheless failed the examination again in 1976 and 1977. In 1978, Tyler paid petitioner $2,500 to ensure that he would pass the latest examination, but again he failed. Petitioner later returned $1,500 to Tyler. Tr. 904, 907-917, 956-958, 973-976. In a recorded conversation in

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[1]Citations to the transcript are taken from the government's brief in the court of appeals.

1979, petitioner guaranteed that Tyler would pass the examination in exchange for an additional $1,500, which Tyler then paid. Tr. 928-929; 6/13/79 Tape Tr. 8-9.

Petitioner's acceptance of funds in return for securing part-time sheriff positions followed a similar pattern. The vast majority of these positions were filled on the recommendations of aldermen and committeemen. Tr. 116-117. In one instance, Murphy Palmer paid petitioner $300, ostensibly for typing a letter from petitioner to the sheriff's office. Palmer obtained his sheriff's position, and subsequently acted as an intermediary between petitioner and other applicants for the post. Tr. 599-603. On petitioner's behalf, Palmer collected between $1,000 and $2,000 from each applicant; twice, applicants paid petitioner directly. *E.g.*, Tr. 259-266, 443-458, 603-617. In a recorded conversation in 1981, petitioner instructed one of the applicants, who had been questioned by the FBI, not to " 'say anything to anybody.' " 12/21/81 Tr. 1-2, 4.

2. The court of appeals affirmed, except with respect to two of the extortion counts,[2] in an unpublished decision (Pet. App. 1a-13a). The court held that petitioner had violated the mail fraud statute, 18 U.S.C. 1341, because petitioner's "sale of his political influence clearly deprived the public of their right to impartial, unbiased, and honest decisions by their elected representative" (*id.* at 6a). In response to petitioner's argument that he had acted solely as a party official without responsibilities to the public, the court noted that no clear distinction could be made between his actions as an alderman and those as a party committeeman (*id.* at 5a). The court also held that the charged mailings, of fingerprint cards for the sheriff's applicants and of

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[2]The court of appeals reversed with respect to these counts because of the absence of proof of an effect on interstate commerce (Pet. App. 12a).

notices of the electrician's examination, were "necessary to insure the victims that their payments were being rewarded" and thus furthered petitioner's scheme to defraud (*id.* at 10a). Finally, the court upheld the sufficiency of the evidence supporting petitioner's conviction for extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (*id.* at 11a-12a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues first (Pet. 16-30) that his sale of political influence did not constitute mail fraud because his duties as an alderman did not include responsibility over the sheriff's office or the licensing of electricians. He contends that, while he was an alderman during the entire period in question, his influence arose solely from his position as a committeeman, which, he asserts, did not give rise to a duty to the public at large. In fact, however, the evidence demonstrated that petitioner's ability to exert power over the naming of part-time sheriffs and the granting of electricians' licenses arose in substantial part as a result of his position as an alderman and that the persons who paid him for political influence sought his assistance and dealt with him as an alderman. See, *e.g.*, Tr. 116-117, 119, 597-598, 615-616, 942. There was in any event "no brightline [*sic*]" (Pet. App. 5a) between petitioner's duties as an alderman and those as a committeeman: the evidence does not support petitioner's attempt to insulate his role as an alderman from the charged activities.

The court of appeals' decision does not conflict with *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). The defendant in *Rabbitt* was a state legislator. In return for a fee, he introduced an architectural firm to persons who might have been able to

secure governmental construction contracts for the firm (583 F.2d at 1020-1021). The court of appeals reversed the defendant's mail fraud convictions because the defendant "did not, in his official capacity, control the awarding of state contracts" (*id.* at 1026). Here, by contrast, the evidence showed that petitioner did have actual power, by virtue of his position as a public official, over the favors he bestowed.[3] The courts of appeals have uniformly concluded that the mail fraud statute applies to conduct such as petitioner's, which violates the duty of officials to provide faithful and honest services to the public, and this Court has consistently declined to review those decisions.[4] There is no reason for a different result here.

2. Petitioner argues next (Pet. 30-38) that his convictions for extortion in violation of the Hobbs Act, 18 U.S.C. 1951, for which he was sentenced to three years' probation, cannot stand in the absence of evidence demonstrating and a jury instruction requiring that he "induced" payments from his victims. Petitioner failed to object to the jury instructions on this ground at trial. Even if he were correct, the

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[3]Although a tangible injury to the public is not required, see, *e.g.*, *United States* v. *Gorny*, 732 F.2d 597, 602 n.2 (7th Cir. 1984), that is present here as well. Unlike in *Rabbitt*, where the contracts were awarded on merit regardless of the defendant's acts (see 583 F.2d at 1026), petitioner's conduct plainly injured the public in a tangible fashion: the sheriff testified that he would not have accepted petitioner's recommendations for appointments had he known that they were conditioned on the applicants' payments to petitioner (Tr. 123, 159-163).

[4]See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Mandel*, 591 F.2d 1347, aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974). Cf., *e.g.*, *United States* v. *Venneri*, 736 F.2d 995 (4th Cir. 1984) (deprivation of loyal and faithful services of employee violated mail fraud statute), cert. denied, No. 84-266 (Nov. 26, 1984); *United States* v. *Bohonus*, 628 F.2d 1167 (9th Cir.) (same), cert. denied, 447 U.S. 928 (1980).

error that he claims, which amounts to nothing more than a semantic quibble, did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice" (*United States* v. *Young,* No. 83-469 (Feb. 20, 1985), slip op. 15). In the absence of such plain error, there is no warrant for this Court's review.[5]

The Hobbs Act proscribes "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). Petitioner's willful acceptance of money in exchange for his misuse of public office is similar in all material respects to conduct that has consistently been held to be within the statute. See cases cited in *United States* v. *O'Grady,* 742 F.2d 682, 689-690 (2d Cir. 1984) (en banc).

Contrary to petitioner's argument, the decision below does not conflict with *United States* v. *O'Grady, supra.* The Seventh Circuit has recently made it clear that its standard comports with the key requirement in *O'Grady* of a misuse of public office, whatever the actual form of words used in the instructions. *United States* v. *Schmidt,* 760 F.2d 828, 832 (1985), cert. denied *sub nom. Folak* v. *United States,* No. 84-1991 (Oct. 7, 1985). The Second Circuit in *O'Grady* similarly emphasized that rejection of its inducement formulation cannot be equated with rejection of the misuse of office requirement (742 F.2d at 689). Moreover, since *O'Grady* was decided this Court has denied certiorari in three Hobbs Act cases arising in circuits that, like the Seventh, have approved somewhat different verbal formulations from those set forth in *O'Grady* of the proper jury

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[5]Moreover, petitioner failed to present this argument in his opening brief in the court of appeals, raising it for the first time in his reply brief. There is no indication in the court of appeals' unpublished decision that it even considered the claim.

instructions where a public official is charged with extortion under color of official right.[6]

In any event, the substance of the offense as defined by the instructions given in this case is not materially different from that set forth in *O'Grady*. The instructions here, which essentially required that each payment be a quid pro quo for petitioner's corrupt use of office (see Pet. 37), were if anything more favorable to the defense than the *O'Grady* standard, which does not require such a quid pro quo (see 742 F.2d at 688-689). Moreover, petitioner's conduct plainly satisfied the inducement standard described in *O'Grady*, where the court of appeals recognized that "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office" (*id.* at 691) and that "the government is not required to prove that the public official demanded or directly solicited the benefits received" (*id.* at 688-689). In a concurring opinion joined by a majority of the judges, the court in *O'Grady* also held that inducement may be inferred from "repeated acceptances over a period of time of substantial benefits" (*id.* at 694 (Pierce, J., concurring)). Judged by these standards, there was ample evidence that petitioner, acting through political operatives, repeatedly induced payments in exchange for sheriff appointments and assurances of passing grades on the electrician's examination. Nothing more is required.

3. Finally, petitioner contends (Pet. 38-44) that the charged mailings did not further his scheme to defraud. The court of appeals correctly rejected this argument: the mailing of fingerprint cards to the applicants for sheriff positions and examination notices to the aspiring electricians

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[6] *United States* v. *McClelland*, 731 F.2d 1438 (9th Cir. 1984), cert. denied, No. 84-6407 (June 10, 1985); *United States* v. *Swift*, 732 F.2d 878 (11th Cir. 1984), cert. denied, No. 84-449 (Jan. 14, 1985); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) and No. 83-1891 (Oct. 9, 1984).

were "for the purpose of executing" the scheme to defraud under 18 U.S.C. 1341 because they were "necessary to insure the victims that their payments were being rewarded" (Pet. App. 10a). This is more than sufficient to bring the mailings within the statute, which does not require "the use of the mails as an essential element" of the fraud. *Pereira* v. *United States,* 347 U.S. 1, 8 (1954). Moreover, contrary to petitioner's contention (Pet. 43), the fact that the mailings took place after he had received funds from his victims does not in itself make his conduct lawful. See, *e.g., United States* v. *Sampson,* 371 U.S. 75 (1962).[7] Petitioner's reliance (Pet. 39, 40) on *United States* v. *Maze,* 414 U.S. 395 (1974), is misplaced. There, unlike here, the mailings "increased the probability that [the defendant] would be detected and apprehended" (*id.* at 403), and the defendant "probably would have preferred" (*id.* at 402) that the mailings had never taken place.

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[7]The question whether certain mailings were in furtherance of a scheme to defraud is currently before the Court in *United States* v. *Lane,* No. 84-744 (argued Oct. 9, 1985). In light of the substantially different facts on which the cases arise, there is no need to hold this petition for the decision in *Lane*: whether or not mailings of insurance forms to a defrauded insurance company furthered the defendants' scheme in *Lane,* the evidence was plainly sufficient here to demonstrate that the mailing of fingerprint cards and examination notices—both essential steps in the process by which the victims were to obtain their desired positions—furthered petitioner's scheme to defraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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